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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-883

FEDERAL POWER COMMISSION, *Petitioner*

v.

JOHN E. MOSS, *et al.*, *Respondent*

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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Amicus Curiae Brief of The Interstate Natural Gas Association of America in Support of Petitioner

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The Interstate Natural Gas Association of America (INGAA), having obtained the consent of all parties as required by this Court's Rule 42, submits this brief as *amicus curiae* in support of the Petitioner.

THE AMICUS

INGAA is a non-profit association. Its members include most of the major natural gas transmission companies subject to the jurisdiction of the Federal Power Commission (FPC) under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (Act) Their operations account for more than 90% of the natural gas transported and sold annually in interstate commerce in the United

States. INGAA has participated as an intervenor or *amicus curiae* before this Court and various United States Courts of Appeal in matters arising out of or related to FPC decisions. It also undertakes to participate in regulatory and other judicial proceedings which are of substantial, industry-wide significance. This is such a case.

THE INTEREST OF AMICUS

INGAA is deeply concerned that the decision below,[1] as it relates to pregranted abandonment could, if affirmed, eliminate a significant source of natural gas for the interstate market which the pipeline companies urgently need in order to minimize curtailments in service to their customers, a problem which has assumed grave national proportions.

Because of the critical shortfall in natural gas supplies which this Court has judicially noticed[2] and the existing regulatory constraints on developing new supplies for interstate pipelines, the interstate lines have found it increasingly difficult to satisfy the requirements of their customers, resulting in industrial plant closures in many sections of the country with resultant unemployment and general economic dislocation. In the recent past a significant portion of new gas coming into the interstate market has been gas purchased pursuant to the optional procedure or limited-term and temporary purchase provisions of the Federal Power Commission's Regulations under the Natural Gas Act.[3]

[1] *John E. Moss, et al.* v. *Federal Power Commission*, 502 F.2d 461.

[2] *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626 (1972).

[3] 18 CFR 2.70. See Statement of Hon. John N. Nassikas, Chairman, Federal Power Commission, Hearings before Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, July 14, 1975, pp. 5-6.

These procedures, either expressed or implied, all involve pre-granted abandonment. It is the pre-granted abandonment portion of the lower court's optional pricing decision that is presently before this Court.

While the interstate pipelines have long advocated long term commitments of gas reserves to their systems, suppressive wellhead price regulation by the Commission has virtually dried up such long-term contracts, particularly in onshore areas where competition from non-regulated intrastate sales has dominated the market place. Thus, today short-term sales are the rule rather than the exception. Unless and until Congress acts to relieve this situation, there is little hope that it will change materially. The pre-granted abandonment provision of the Commission's optional pricing procedure, which the court below declared unlawful, has been one of the main features of this effort to get new gas committed to the interstate market.

INGAA concurs with the decision of the court below to the extent it upholds the Commission's existing optional pricing procedure, but opposes that decision to the extent it would disallow pre-granted abandonment. The decision of the court below has cast a serious cloud on the continued viability of these pre-granted abandonment provisions. The fact is, little new gas onshore is being made available to the interstate buyers.[4] This creates an intolerable situation for the interstate pipelines and the millions of consumers throughout this nation who are dependent on these pipelines for their

[4] Since the wellhead price of gas in the intrastate market is not subject to controls the bulk of new onshore gas has been diverted away from the interstate market to intrastate buyers. Natural gas produced on the Outer Continental Shelf (offshore) on Federal Lands is required by law to be sold in interstate commerce. See Outer Continental Shelf Lands Act, 43 U.S.C. 1334(c).

natural gas supplies. Furthermore, in a recent gas curtailment report by the FPC Staff, it was projected that curtailments of natural gas for the April 1975 through March 1976 period would be 45% higher than they were during the preceeding twelve months.[5] Consequently, if the lower court's ruling on pre-granted abandonment is sustained, the percentage of curtailments projected by the FPC Staff Report could be even greater.

This case presents a question of overriding public importance. INGAA supports the position of Petitioner that it has the authority under the Natural Gas Act to authorize pre-granted abandoment under proper circumstances and that its action below was a proper exercise of such authority.

ARGUMENT

I

As stated above, it is INGAA's position that the Commission has the authority under the Natural Gas Act to issue certificates for a limited duration, which by their very nature terminate at the end of the certificate period unless otherwise conditioned. In substantiation of this position we rely on this Court's decision in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, affirming 267 F.2d 471 (*Sunray II*), and this Court's decision in *Sun Oil Co.* v. *Federal Power Commission,* 364 U.S. 170, (*Sun*), a companion case to *Sunray II,* issued simultaneously with that decision. Actually, the question first arose in a Tenth Circuit decision involving Sunray, which was reversed by this Court on other grounds.[6]

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[5] FPC Staff Gas Curtailment Report, Federal Power Commission Release No. 21454, June 6, 1975.

[6] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 239 F.2d 97 (CA 10), rev'd. on other grounds 353 U.S. 944 (*Sunray I*).

These decisions dealt with the question of the Commission's authority to issue permanent, unlimited certificates, but the Court left no doubt as to the Commission's authority under proper circumstances to issue limited-term certificates. The D. C. Circuit completely misconstrued this Court's holdings as well as the Tenth Circuit's conclusions in *Sunray I.*

In *Sunray I,* a natural gas producer sought a certificate which would end coterminously with the underlying contracts for the sale of the gas. The Commission refused to allow the certificates to be limited, and stated that:

> We have consistently held that cessation of service may be authorized only in a proceeding initiated under Section 7(b) of the Natural Gas Act. (Sunray Oil Corp., 14 FPC 877)

However, on appeal, the Tenth Circuit held that the Commission could, "in a proper case . . . grant certificates of convenience and necessity for periods of limited duration" (*Sunray I* 239 F.2d at 100). This authority, the Tenth Circuit held, arises out of the provisions of Section 7(e) of the Act empowering the Commission "to attach . . . such reasonable terms and conditions as the public convenience and necessity may require." (15 U.S.C. 717f(e))

Subsequently, in *Sunray II,* the Tenth Circuit held that the Commission has authority to issue not only certificates for a limited-term, but also certificates without a time limitation even when the producer applicant had applied for a certificate of limited duration. This Court affirmed the Tenth Circuit's *Sunray II* decision (*supra*) and also endorsed that Circuit's decision in *Sunray I,* that the Commission could

issue certificates of limited-term under proper circumstances.

In the *Sun* case, affirming the Commission's issuance of a permanent rather than a term certificate to Sun, the Court in the course of its decision said:

> Of course, if, despite its authority to grant a permanent certificate, the Commission had in 1956 *actually granted a term certificate to petitioner, petitioner would after the term have been free to apply for a new certificate to authorize the sale under the new contract* (364 U.S. at 174) (Emphasis supplied).

Citing *Sunray I,* the Court went on to note that:

> " . . . the batch of certificates containing petitioner's was issued at a time when the Commission was asserting that it lacked even the power to issue a term certificate . . . It was not until October 29, 1956, that judicial rejection of the Commission's position occurred." *Id.* (Footnote omitted)

It is clear, therefore, that this Court has long recognized the authority of the Commission to issue limited-term certificates under proper circumstances which necessarily entail pre-granted abandonment. We submit, therefore, that the D. C. Circuit erroneously interpreted this Court's ruling in *Sunray II* to the extent of finding that *Sunray II* stands for the proposition that the Commission does not have authority under the optional pricing procedure to allow pre-granted abandonment.[7] The Court's order in these respects should be reversed and the Commission's action affirmed.

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[7] The D.C. Circuit seemingly ignored *Sun* since no reference at all is made to this case in its decision.

II

Although not involved here, the lower court's decision relative to pre-granted abandonment has cast a shadow over the limited-term and emergency purchase procedures under Sec. 2.70 of the Commission's Regulations even though such procedures relate to shorter term sales than those contemplated by the optional procedures of Sec. 2.75(e). It is important, therefore, that the Court remove whatever uncertainty may exist by affirming Petitioner's interpretation of its authority under the Act to approve future termination of service. Without these special procedures, the curtailments on the interstate pipeline systems will be even greater than presently estimated with concommitant economic and social ill effects on both the pipeline systems and the ultimate consumer. From 1971 through the first quarter of 1975, a considerable amount of all gas purchased by interstate pipelines was under the optional pricing, limited-term and temporary emergency procedures.[8] Thus, the shadow created by the D. C. Circuit's decision in the instant case over the Sec. 2.70 procedures relative to pre-granted abandonment, portends grave consequences for millions of consumers if as a result a barrier is erected to emergency and limited-term sales of gas by producers to interstate pipelines.

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[8] Of the approximately 2.1 Tcf of natural gas sales committed to the interstate market from 1973, through the first quarter of 1975, 982 Bcf were committed pursuant to optional, limited-term, and emergency procedures. These volumes have contributed mightily to the interstate pipelines' ability to meet peak winter season demands. See Statement of Hon. John N. Nassikas, Chairman, Federal Power Commission, Hearings before the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, July 14, 1975, p. 6.

The critical supply shortage facing the Nation today behooves the Commission, the Courts, industry and all interested parties to take all reasonable steps to develop new reserves of this vital premium fuel. The Commission's orders below, including the provision for pre-granted abandonment, were consistent with this objective and within its authority to prescribe.

CONCLUSION

For the reasons stated the judgment of the lower court should be reversed insofar as it declared unlawful and set aside Section 2.75(e) of the Commission's Regulations (18 CFR 2.75(e)), and the action of the Commission in adopting same should be affirmed.

Respectfully submitted,

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July 31, 1975

Certificate of Service

I certify that I have this day served the foregoing Amicus Curiae Brief of the Interstate Natural Gas Association of America in Support of Petitioner, on all parties to the proceedings in accordance with the requirements of this Court's Rule 33.

DATED at Washington, D. C., this 31st day of July, 1975.

/s/ JEROME J. MCGRATH
Jerome J. McGrath